United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 2, 2006

TO : Gary T. Kendellen, Regional Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: ConocoPhillips
Case 22-CA-27053

512-5009-0100
518-2000
518-2083-3367
518-2083-5000

The Region submitted this case for advice as to whether the Employer violated Sections 8(a)(1) and (2) by financing the defense of two current supervisors being sued by the Union for internal fines imposed for their prior misconduct as Union members.[1] We conclude that the Employer's financing its supervisors' challenge of an independent Union action in court is not proscribed "interference" under Section 8(a)(2) and does not intrude on Section 7 rights under Section 8(a)(1). Thus, the Region should dismiss the charge, absent withdrawal.

FACTS

ConocoPhillips (the Employer) operates a gasoline refinery in Linden, New Jersey. Conoco has a long-standing collective bargaining relationship with Local 877, International Brotherhood of Teamsters (the Union).

Conoco unit employees who voluntarily work as temporary supervisors are called "uprates." In 2002, prior to the commencement of successor contract negotiations, the Union issued a directive requiring all "uprates" to step down and return to the unit. Union members Thomas Warnke and Oliver Cody refused to comply with the directive. The Union brought internal charges against Warnke and Cody and ultimately fined each of them $1,200.00. In the interim, Conoco promoted Warnke and Cody to permanent supervisor positions out of the unit.

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[1] The Region also submitted a Section 8(a)(3) allegation for Advice. The Union failed to provide any evidence supporting this allegation. Thus, we agree with the Region that it should dismiss the 8(a)(3) allegation.

Neither Warnke nor Cody paid the fine. In order to compel payment, the Union filed a lawsuit in state court against the supervisors. Warnke and Cody hired counsel to defend against the collection suit and to file a counterclaim against the Union. Warnke hired his counsel based on the recommendation of Conoco's Human Resources Department. Cody hired the same counsel, based on Warnke's suggestion. Conoco is paying for their legal representation. The litigation is pending and the supervisors' counterclaim recently survived a motion to dismiss.

The Region recommends that the General Counsel issue a Section 8(a)(1) and (2) complaint, absent settlement, attacking Conoco's assistance to the supervisors in the litigation.

ACTION

We conclude that Conoco's financing its supervisors' challenge of an independent Union action in court is not proscribed "interference" under Section 8(a)(2) and does not intrude on Section 7 rights under Section 8(a)(1). Thus, the Region should dismiss the charge, absent withdrawal.

Section 8(a)(2)

Section 8(a)(2) makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration" of a union or "contribute financial or other support to it." Proscribed "interference" under Section 8(a)(2) generally involves intrusive employer participation in the union's internal affairs. For example, unlawful interference includes situations where an employer permits a supervisor to serve the union in a position that involves negotiations and grievance handling.[2] Further, an employer's providing legal services to the union to assist it in its formation,[3] in formulating contract proposals,[4] or

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[2] Vanguard Tours, 300 NLRB 250, 250, 265 (1990), enfd. in rel. part 981 F.2d 62 (2d Cir. 1992); General Steel Erectors, 297 NLRB 723, n.1 (1990), enfd. 933 F.2d 568 (7th Cir. 1991); Power Piping Co., 291 NLRB 494, 497 (1988).

[3] G.L. Gibbons Trucking Service, 199 NLRB 590, 592, 596 (1972), enfd. 85 LRRM 2303 (9th Cir. 1973) (table).

[4] Sportspal, Inc., 214 NLRB 917, 926 (1974).

in fending off a challenge by a rival,[5] is a classic example of interference under Section 8(a)(2).

These cases demonstrate that interference in the 8(a)(2) context, including the unlawful provision of legal services, involves situations where the employer is assisting or supporting the union in determining its course of action. Conoco's conduct falls well outside this definition of "interference" under Section 8(a)(2). Rather the Union here has independently taken action and Conoco is financing a challenge to that action in a judicial forum.

We find no legal basis to extend the definition of "interference" under Section 8(a)(2) to that situation. Such a reading is not reflected in Congressional intent. Congress enacted Section 8(a)(2) to end company-dominated unions and their destructive impact on employee free choice.[6] The litigation here will not result in the Employer encroaching on the independence of the Union. Rather, the defendants' success against the Union in the neutral forum will simply result in the vindication of their legal rights; failure will leave the status quo. Hence the Region should dismiss the Section 8(a)(2) charge, absent withdrawal.

Section 8(a)(1)

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. An employer's remarks or actions violate Section 8(a)(1) if they tend to interfere with the free exercise of employee rights under the Act.[7] In Southern California Gas Co.,[8]

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[5] Versatube Corp., 203 NLRB 456, 461 (1973), enfd. 492 F.2d 795 (6th Cir. 1974). See also Duquesne University, 198 NLRB 891, 892, 898 (employer assisting union in selecting a particular attorney to represent it in Board representation proceeding constituted 8(a)(2) interference); Homemaker Shops, 261 NLRB 441, 442, 443 (1982) (employer offering the union the services of its attorney after rival union filed election petition and charge was 8(a)(2) interference), enf. denied 724 F.2d 535 (6th Cir. 1984).

[6] Electromation, Inc., 309 NLRB 990, 992-994 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994).

[7] T-West Sales & Service, Inc., 346 NLRB No.4, slip op. at p.21 (2005).

Advice authorized the Region to issue a Section 8(a)(1) complaint where the employer financed an employee union member's appeal of a court judgment obtained by the union ordering payment of back dues. Advice concluded that the employer was interfering with "the Union's relationship with its members by intruding itself into the Union's lawful function of collecting dues." Advice reasoned that the foreseeable consequence of the employer's financing the employee's appeal was that "employee members of the Union will be encouraged to avoid paying dues, because they can obtain free legal representation from the Employer in resisting the Union's efforts to collect back dues."

In this case, Conoco's financing of the litigation against the Union does not have that consequence. Conoco is supporting 2(11) *supervisors* in their litigation with the Union. Thus, Conoco's financing of the lawsuit will not encourage rank and file employee members of the Union to avoid paying internal fines. Employee members, as nonsupervisors, will have no reasonable expectation that Conoco will come to their rescue. Hence, unlike the situation in Southern California Gas Co., Conoco's financing of the litigation does not tend to interfere with the Union's legitimate relationship with its employee members.

Further, the ethical obligations of the defendants' lawyer provide a check on Conoco's control of the supervisors' litigation against the Union. New Jersey Rule of Professional Conduct 1.8(f) prohibits counsel from accepting fee payments from a third party unless, *inter alia*, there is "no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship." Hence, Rule 1.8(f) introduces a degree of separation between Conoco's financing of the lawsuit and any tendency of that litigation to affect employees in the exercise of their Section 7 rights. Thus, Rule 1.8(f) also restricts the extent to which, by financing litigation, an employer can interfere with employees in the exercise of their NLRA rights. In any event, there is no evidence that Conoco is, in fact, controlling any aspect of the supervisors' litigation.

In light of our conclusions above, we need not address whether the First Amendment right to petition the government for redress of grievances extends to Conoco's financing of the litigation in this case[9] and, if so, the significance of

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[8] Case 31-CA-21094, Advice Memorandum dated November 28, 1995.

[9] See 52nd Street Hotel Assoc. d/b/a Novotel New York, 321 NLRB 624, 630-632 (1996)(recognizing a union's

the court's denial of the Union's motion to dismiss the counterclaim being financed by Conoco as well as the absence of evidence that Conoco is financing the litigation to retaliate against the exercise of Section 7 rights.[10]

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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constitutional right to finance litigation), citing, *inter alia*, NAACP v. Button, 371 U.S. 415 (1963). See generally Bill Johnson's Restaurants, Inc., v. NLRB, 461 U.S. 731, 741 (1983) (the Board must "be sensitive to...First Amendment values in construing the NLRA").

[10] See generally Caterpillar Inc., Case 33-CA-10389, Advice Memorandum dated January 31, 1995; Southern California Gas Co., supra (employer violated Section 8(a)(1) by financing employee appeal which lacked merit); Leeds and Northrup Co., 155 NLRB 1292, 1293-1294 (1965) (employer financing employee court defense resisting illegally levied union fine did not violate Section 8(a)(1)).